LAU YOKE HEE & ANOR

v.

TING LIANG TENG & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
TENGKU BAHARUDIN SHAH JCA
ZULKEFLI AHMAD MAKINUDIN J
[CIVIL APPEAL NO: A-02-798-1999]
27 JUNE 2005

SUCCESSION: *Administration - Sale of land - Appeal by administrators of deceased's estate against order decreeing specific performance of sale and purchase agreement - Whether sale of property belonging to deceased could be transacted without consent of beneficiaries of that estate - Whether decree of specific performance bad in law - Probate and Administration Act 1959, s. 60(2)*

CONTRACT: *Specific performance - Sale and purchase of land - Appeal by administrators of deceased's estate against order decreeing specific performance of sale and purchase agreement - Whether agreement tainted by coercion - Whether there was consideration - Whether wrong for purchasers to enter into possession of land - Whether there was a specifically enforceable contract*

This was an appeal by the appellants against the order of the learned High Court judge decreeing specific performance of a sale and purchase agreement ('the agreement') made in 1976 between the respondents and the appellants, acting as administrators of the estate of one Low Sau Chin ('the deceased'). The main issue that fell for determination by the learned judge was whether the agreement had been entered into voluntarily by the first appellant or whether it was tainted by coercion in the sense defined by s. 15 of the Contracts Act 1950. The learned judge came to the conclusion that the first appellant was not a truthful witness. The appellants contended that the learned judge was wrong in his conclusion and had failed to have regard to critical parts of the evidence which demonstrated want of true consent on the part of the first appellant *ie,* the fact that soon after the execution of the agreement, the first appellant refused to accept RM10,000 paid by the respondents as earnest money. The appellants also alleged that the decree of specific performance was bad in law because the consent of the beneficiaries of the

deceased's estate was not obtained before it was made; they relied on s. 60(2) of the Probate and Administration Act 1959 ('the Act'). They further averred that there was no consideration for the agreement in question as the RM10,000 earnest money had never been received by the appellants and that it was wrong for the respondents to go on the subject land and cultivate it.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

[1] The refusal of the appellants to accept the RM10,000 was not a pointer towards want of consent. Upon careful reading of the judgment of the learned judge, it was clear that he had undertaken with unusual acuteness a judicial appreciation of the oral evidence presented before him. Having scrutinised the printed evidence, this court was inclined to agree with the learned judge that the first appellant was not a truthful witness and was, therefore, disinclined to disturb the finding of fact on the issue of coercion made by the learned judge. (pp 774 c & 775 a)

[2] With regard to the appellants' contention that the decree of specific performance was bad in law, the appellants' interpretation of s. 60(2) of the Act was flawed. It was not, and it had never been the law that the sale of property belonging to the deceased could not be transacted without the consent of the beneficiaries of that estate (*Itam Saad v. Chik Abdullah* and *Chee Hock Lai v. Tan Swee Thai & Ors* folld). (p 775 e-f)

[3] With regard to the issue of consideration, the appellants were mistaken in saying that there was no consideration. The consideration in the present case was encompassed in the reciprocal promises exchanged by the parties and evidenced by the written agreement made in 1976. It was also not wrong for the respondents to go on the subject land and cultivate it since the acts of entry into possession by the respondents constituted acts of part performance of the respondents. It was also pertinent to bear in mind that having entered into a specifically enforceable contract, the respondents were to be treated as beneficiaries under a constructive trust of which the second appellant and her co-administrator were trustees. (p 776 f-h)

[4] For these reasons, it was apparent that no appealable error on the part of the learned judge had been demonstrated. All orders made by the learned judge were thereby affirmed. (p 777 e)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan yang arif hakim Mahkamah Tinggi memerintahkan pelaksanaan spesifik satu perjanjian jual beli ('perjanjian') yang dimeterai pada tahun 1976 di antara responden-responden dan perayu-perayu, selaku pentadbir pusaka seorang Low Sau Chin ('si mati'). Isu utama yang perlu diputuskan oleh yang arif hakim adalah sama ada perjanjian telah dimasuki oleh perayu pertama dengan sukarela atau sama ada ianya dikotori oleh paksaan menurut maksud s. 15 Akta Kontrak 1950. Yang arif hakim mendapati bahawa perayu pertama adalah seorang saksi yang tidak bercakap benar. Perayu-perayu mengatakan bahawa yang arif hakim silap dalam mencapai konklusinya itu, serta gagal menimbang beberapa bahagian penting keterangan yang menunjukkan ketiadaan persetujuan di pihak perayu pertama, iaitu, fakta bahawa sejurus selepas pemeteraian perjanjian, perayu pertama enggan menerima wang pendahuluan sebanyak RM10,000 yang dibayar oleh responden. Perayu-perayu juga menegaskan bahawa dekri pelaksanaan spesifik tidak sah di sisi undang-undang, oleh kerana izin dari waris-waris pusaka si mati telah tidak diperolehi terlebih dahulu; mereka bergantung kepada s. 60(2) Akta Probet dan Pentadbiran 1959 ('Akta'). Perayu-perayu seterusnya mengatakan bahawa perjanjian tidak mempunyai balasan kerana wang pendahuluan RM10,000 tersebut tidak diterima oleh mereka, dan bahawa adalah salah bagi responden untuk memasuki tanah dan bercucuk tanam di atasnya.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

[1] Keengganan perayu-perayu menerima wang pendahuluan sebanyak RM10,000 bukanlah petanda bahawa persetujuan tidak wujud. Membaca keputusan yang arif hakim dengan teliti menunjukkan dengan jelas bahawa beliau telah mempertimbang dengan amat halus dan terperinci akan keterangan-keterangan yang dikemukakan di hadapannya. Setelah meneliti keterangan yang ada, mahkamah ini cenderung untuk bersetuju dengan yang arif hakim bahawa perayu pertama bukan seorang saksi yang bercakap benar dan, dengan itu, tidak bersedia untuk mengganggu dapatan fakta mengenai isu paksaan sepertimana yang dibuat oleh yang arif hakim.

[2] Berhubung hujah perayu-perayu bahawa dekri pelaksanaan spesifik tidak sah di sisi undang-undang, jelas bahawa pentafsiran perayu-perayu terhadap s. 60(2) Akta adalah cacat. Ianya bukanlah undang-undang, dan tidak pernah menjadi undang-undang, bahawa penjualan harta-harta milik si mati tidak boleh dibuat tanpa persetujuan waris-waris pusaka tersebut (*Itam Saad v. Chik Abdullah* dan *Chee Hock Lai v. Tan Swee Thai & Ors* diikuti).

[3] Mengenai isu balasan, perayu-perayu silap dalam mengatakan bahawa tidak wujud balasan. Balasan dalam kes ini terangkum dalam janji-janji yang diukir oleh kedua-dua pihak dan terbukti melalui perjanjian bertulis yang dibuat pada tahun 1976. Adalah juga tidak salah bagi responden untuk memasuki tanah dan bertanam di situ, kerana perbuatan mengambil milikan tanah oleh responden tersebut mencerminkan pelaksanaan perjanjian sebahagiannya. Perlu juga disedari bahawa setelah memeterai suatu kontrak yang jelas boleh dikuatkuasakan, responden harus dianggap sebagai pewaris kepada suatu amanah konstruktif di mana perayu kedua dan rakan pentadbirnya merupakan pemegang-pemegang amanah.

[4] Atas alasan-alasan ini, nyata bahawa yang arif hakim tidak melakukan sebarang kesilapan yang boleh dijadikan subjek rayuan. Dengan itu, semua perintah yang dibuat oleh yang arif hakim adalah disahkan.

Case(s) referred to:
Chee Hock Lai v. Tan Swee Thai & Ors [1990] 2 CLJ 354; [1990] 1 CLJ (Rep) 354 (HC) ***(foll)***
Clarke v. Edinburgh Tranways Co [1919] SC (HL) 35 ***(refd)***
Itam Saad v. Chik Abdullah [1974] 2 MLJ 53 ***(foll)***
Lin Nyut Chan v. Wong Sz Tsin [1964] MLJ 200 ***(refd)***
Lysaght v. Edwards 2 Ch D 499 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 15
Probate and Administration Act 1959, s. 60(2)

For the appellants - Chan Sing Khuen; M/s Vincent Hooi & Chan
For the respondents - P Gananathan (Olivia Loh with him); M/s Bodipalar Ponnudurai Nathan

[Appeal from High Court, Ipoh; Civil Suit No: 5-1980]

Reported by Suresh Nathan

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

This is an appeal directed against the order of the learned judge decreeing specific performance of an agreement made in November 1976 between the respondents ("plaintiffs in the court below") and the appellants ("defendants in the court below") acting as administrators of the estate of Low Sau Chuin @ Lau Chaik Tong @ Lau Sau Chuin, (deceased).

The main issue that fell for determination by the learned judge was whether the sale and purchase agreement had been entered into voluntarily by the first appellant or whether it was tainted by coercion in the sense defined by s. 15 of the Contracts Act 1950. After the trial at which oral testimonies were led by both sides and having heard the parties' respective witnesses being tested on cross-examination, the learned judge came to the conclusion that the first appellant was not a truthful witness. The learned counsel who had argued this case for the appellants stated that the learned judge was wrong in his conclusion. It is the appellants' case that the learned judge failed to have regard to critical parts of the evidence which demonstrate want of true consent on the part of the first appellant. Our attention was drawn to the fact that soon after the execution of the agreement the first appellant refused to accept the RM10,000 paid by the respondents as earnest money. This, it was submitted was a pointer towards want of consent. With respect we cannot agree. We have read the judgment of the learned judge very carefully and we find that he has undertaken with unusual acuteness a judicial appreciation of the oral evidence presented before him.

In a case such as the present, we would respectfully remind ourselves of what Lord Shaw of Dunfermline said in *Clarke v. Edinburgh Tranways Co.* [1919] SC (HL) 35 at p. 36 as follows:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelids, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Having scrutinized the printed evidence we are inclined to agree with the learned judge that the first appellant is not a truthful witness. We are therefore disinclined to disturb the finding of fact on the issue of coercion made by the learned judge.

That brings us to the next point. The complaint here is that the learned judge should not have decreed the specific performance because the co-administrator, *Lau Yoke Hee* (deceased), the first defendant in the court below who is not before us in this appeal, had not assented to the sale. There is absolutely no merit in this argument. As pointed out by my learned brother, Tengku Baharudin Shah JCA, the co-administrator had in fact written a letter that not only shows that she was aware of the sale but had assented to it.

The third ground advanced before us is that the decree of specific performance is bad in law because the consent of the beneficiaries of the deceased's estate was not obtained before it was made. Learned counsel for the appellants relies on s. 60(2) of the Probate and Administration Act 1959 which reads as follows:

> Unless the Court otherwise directs, no sale, transfer, conveyance or assent in respect of immovable property shall be made without the concurrence of all the personal representatives of the deceased; and subject as aforesaid, where there are several personal representatives the power of all may, in the absence of any direction to the contrary in the will or grant of administration, be exercised by any one of them.

With respect, we are unable to agree with learned counsel's interpretation of this section. It is not, and it has never been the law that the sale of the property belonging to the deceased cannot be transacted without the consent of the beneficiaries of that estate. There are a number of authorities on that point but we only need to refer to two of them. The first is *Itam bte Saad v. Chik bte Abdullah* [1974] 2 MLJ 53. In that case, Syed Agil Barakbah J (later SCJ) whose learning on this area of the law is to be regarded with deep respect had this to say:

> As a general principle it was held by the Court of Appeal in *Haji Saud v. Haji Ahmad & Anor* [1957] MLJ 50 that an administrator can enter into an agreement for the sale of immovable property but the agreement is unenforceable unless the permission of the court is obtained. The High Court is empowered in cases of this kind to give permission of the court required under the section and if permission is not given, the Court of Appeal is empowered to do so. That was a similar case in which specific performance was prayed for and allowed. The appellant as administrator of the estate made an agreement in the presence of beneficiaries for sale of land comprised in the estate. The purchase price was paid and distributed amongst the beneficiaries. The title deed was handed to the first respondent and the two other respondents were put in possession of

the land and still in possession. The administrator took no steps to register the respondents (the purchasers) as owners of the land and in consequence the proceedings were commenced.

Similarly in a much earlier case in the Court of Appeal, *Haji Osman bin Abu Bakar v. Saiyed Noor bin Saiyed Mohamed* [1952] MLJ 37, which was applied in *Haji Saud*'s case, *supra*, the transfer of land was executed by the proprietor of land who died before it was presented for registration. Both the documents of title and the transfer were handed to the purchaser who subsequently sued the administrator for specific performance. It was held that the death of the proprietor-transferor of land did not avoid the contract; the legal personal representative of such deceased person was trustee for the purchaser who, subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake, was entitled to the land and to the possession.

The next authority is *Chee Hock Lai v. Tan Swee Thai & Ors* [1990] 2 CLJ 354; [1990] 1 CLJ (Rep) 354 where Abdul Malek J (now President of this court) said:

Based on the said authorities, I had referred to ss. 60 and 71 of the Probate and Administration Act 1959 where the provisions clearly state that where an administrator of an estate takes action without getting the approval of the court, the said action or any agreement made does not become null and void on the application of any party who has an interest in the matter. In this case, no one has taken any steps to vitiate the said agreement and moreover following the case of *Itam bte Saad v. Chik bte Abdullah* [1974] 2 MLJ 53 which was upheld by the Federal Court in *Chik bte Abdullah v. Itam bte Saad* [1974] 1 MLJ 221, the consent of the beneficiaries is not necessary to make the said agreement.

By reason of the authorities already cited there is no merit in the complaint now made before us. This ground of appeal also fails.

In the course of his argument, learned counsel for the appellants said that there was no consideration for the agreement in question because the RM10,000 earnest money had never been received by the appellants. With respect we cannot agree. The consideration in the present case is encompassed in the reciprocal promises exchanged by the parties and evidenced by the written agreement made in November 1976. Neither can we agree with learned counsel's submission that it was wrong for the respondents to go on the subject land and cultivate it. In our judgment, the acts of entry into possession by the respondents constitute acts of part performance of the respondents. In this context we would refer to the judgment of the Federal Court in *Lin Nyut Chan v. Wong Sz Tsin* [1964] MLJ 200. It is also pertinent to bear in mind that having entered into a specifically enforceable contract, the respondents are to be treated as beneficiaries under a constructive trust of which the

second appellant and her co-administrator are trustees. If authority is necessary to support this proposition it is to be found in the judgment of Jessel MR in *Lysaght v. Edwards* 2 Ch. D 499. This is what the learned Master of Rolls said in that case:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, *viz.*, possession of the estate and a charge upon the estate for his purchase-money ... Now, what is the meaning of the term 'valid contract?' 'Valid contract' means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser – a contract binding on both parties.

For the reasons already given, we are satisfied that no appealable error on the part of the learned judge has been demonstrated. The appeal is accordingly dismissed. The appellants will pay costs of the appeal to the respondents. All orders made by the learned judge of the High Court are hereby affirmed.